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NTSB Order No. EA-4056

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 7th day of January, 1994

DAVID R. HINSON, Administrator, Federal Aviation Administration, Complainant, v. ELLIOT M. CANNON and TIMOTHY D. WINTER, Respondents.	)	Dockets SE-12225 and SE-12185

OPINION AND ORDER

The Administrator and respondent Winter have both appealed from the oral initial decision issued by Administrative Law Judge William R. Mullins at the conclusion of an evidentiary hearing held in this matter on January 29, 1992.[1] In that decision, the law judge found that respondents deviated from an air traffic

[1] Attached is an excerpt from the hearing transcript containing the oral initial decision.

control (ATC) clearance, as alleged in the complaint, but that no endangerment had resulted therefrom. Accordingly, he affirmed the order suspending respondent Winter's airline transport pilot (ATP) certificate only insofar as it alleged a violation of 14 C.F.R. 91.123(a), and he dismissed the alleged violations of 14 C.F.R. 91.13(a) as to both pilots.[2] Since section 91.13(a) was

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[2] Section 91.123(a) provides:

§ 91.123 Compliance with ATC clearances and instructions.

(a) When an ATC clearance has been obtained, no pilot in command may deviate from that clearance, except in an emergency, unless an amended clearance is obtained. A pilot in command may cancel an IFR flight plan if that pilot is operating in VFR weather conditions outside of positive controlled airspace. If a pilot is uncertain of the meaning of an ATC clearance, the pilot shall immediately request

the only violation charged against respondent Cannon, the law judge dismissed the order suspending Cannon's airline transport pilot certificate in its entirety.[3]

The Administrator argues on appeal that the section 91.13(a) charges should be reinstated against both pilots. Respondent Winter does not directly contest the law judge's finding of the section 91.123(a) violation, but rather, asserts that the initial decision should be overturned because he was prejudiced by what respondent Winter characterizes as the law judge's "hurried

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clarification from ATC.

Section 91.13(a) provides:

§ 91.13 Careless or reckless operation.

(a) *Aircraft operations for the purpose of air navigation.* No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

[3] The orders of suspension contained waivers of penalty since both respondents filed timely reports of this incident, thereby entitling them to sanction immunity pursuant to the FAA's Aviation Safety Reporting Program.

scheduling" of the hearing date in this case. (Winter App. Br. at 5.) For the reasons discussed below, the Administrator's appeal is granted and respondent Winter's appeal is denied.

Respondents attempted to show at the hearing that ATC knew, or should have known, that respondents' aircraft (a DC-8 "heavy") would not be able to comply with the portion of their departure clearance which required it to meet the minimum altitude restriction of 14,000 feet at the DOWST intersection.[4] Neither respondent testified at the hearing, but both submitted written statements indicating that they assumed ATC was aware they would be unable to make the restriction and would issue them an amended clearance. (Exhibits R-1 and R-2.)

Although the law judge accepted respondents' position that ATC knew the aircraft was not going to make the altitude restriction, he nonetheless found that respondents -- who freely admitted in their written statements that they knew "during the entire departure" that they would not make the restriction (Exhibits R-1 and R-2) -- should have called ATC long before the deviation occurred and requested an amended clearance. (Tr. 293-5, 297.) However, he concluded that "since ATC sat there and watched this whole thing progress," and since respondents' deviation did not result in any loss of standard separation between aircraft, there was no endangerment and, therefore, no

[4] At the time of this incident, the 14,000 foot altitude restriction at DOWST was a part of the standard instrument departure from Ontario International Airport, Ontario, California. Exhibit A-4.

violation of section 91.13(a) as to either respondent. (Tr. 298.) The law judge likened the situation to a "speed trap," and noted his belief that, if there had been any potential endangerment, the controller would not have allowed respondents' aircraft to continue climbing in the same flight path to 23,000 feet, as he did (Exhibit A-1), but would instead have instructed them to take immediate evasive action at the time of the deviation. (Tr. 293.)

It appears from the initial decision that in finding no violation of § 91.13(a) the law judge referred only to the absence of any actual endangerment (e.g., no loss of separation between aircraft). (Tr. 293, 298.) In so doing, the law judge applied the wrong standard for a determination of a § 91.13(a) claim, as it is well established (and the law judge himself recognized (Tr. 288, 293)) that the endangerment can be either actual or potential.[5] More importantly, the law judge appears to have misapprehended the evidence in this case on the issue of whether a potential endangerment occurred. The law judge appears to have reacted to the argument that ATC, as a corporate body, was aware of the difficulty some aircraft had with the altitude requirements at DOWST, and that, since the issue was addressed in a broadcast Automated Terminal Information Service notice and since the altitude requirements were subsequently adjusted, that ATC's corporate understanding assured safe handling of the

[5] See Administrator v. Haines, 1 NTSB 769 (1970), aff'd. Haines v. DOT, 449 F.2d 1073 (D.C. Cir. 1971)

respondents' aircraft. Indeed, respondents' counsel maintained throughout the hearing that it was obvious to everyone involved, based on the aircraft's speed and rate of climb (information respondents' counsel argued was apparent from the controller's radar screen), that respondents would not be able to make the 14,000 foot altitude restriction at DOWST, with the implication that ATC was therefore carefully monitoring the flight and avoiding endangerment. But there is, of course, a controlling distinction between the protestations of counsel and relevant, material evidence. The evidence of record is primarily the testimony of the Sector 18 controller who was working the aircraft at the time, and it does not support the law judge's conclusion.[6]

Although the Sector 18 controller admitted knowing at 1627:55 (just seconds before the deviation occurred) -- when he asked whether the flight had been given an altitude restriction at DOWST -- that compliance with the restriction was unlikely, he testified that he had no way of knowing any earlier that the aircraft was not going to make it. (Tr. 112-3, 140.) Indeed, when the flight checked onto his frequency at 1626:11,

[6] The law judge did not reject as incredible the controller's testimony that he did not know of the impending deviation, nor, for that matter, did he even appear to recognize the inconsistency of his finding that "ATC knew," with the controller's testimony that he did not know. However, to the extent that his finding implies a credibility determination, we note that we need not defer to it in light of our conclusion that the finding is inconsistent with the overwhelming weight of the evidence. See Administrator v. Blossom, NTSB Order No. EA-3081 at 4 (1990).

transmitting "[UPS 1901] heavy with you out of nine thousand for one four thousand," there was no hint that the crew anticipated any trouble meeting the DOWST altitude restriction.[7] (Exhibit A-1.)

Not only did the Sector 18 controller not know that respondents would be deviating from their clearance, but it is apparent that controllers in the sector directly below (into whose airspace respondents strayed when they did not meet the 14,000 foot restriction) did not know either.[8] This is evident from the fact that the Sector 18 controller found it necessary to co-ordinate with that adjacent sector, after the deviation, in order to alert them to the presence of respondents' aircraft in their airspace and to insure appropriate separation. (Exhibit A-1, Tr. 119, 134-5.)

Thus, the evidence in the record will not support the law judge's finding that ATC (at least the relevant units within ATC) "knew" respondents would not be able to meet the 14,000 foot restriction.[9] Hence, respondents' unanticipated non-compliance

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[7] Respondent Winter's suggestion that his subsequent request (at 1627:49) as to whether there was a speed restriction on the aircraft was intended as a "polite nudge" to the controller to "pay attention to what was going on," is unconvincing. (Exhibit R-2.)

[8] The duties of the Sector 18 controller (whose airspace begins at 14,000 feet and extends upwards) include sequencing and separation of departures and arrivals from the various airports in the area. Accordingly, it is clear that the 14,000 foot minimum altitude restriction at DOWST intersection for departing aircraft serves an important safety purpose. (Tr. 69-70.)

[9] Accordingly, we need not decide the hypothetical question of whether prior knowledge by all relevant controllers of an

with the clearance resulted in potential endangerment.[10] Accordingly, the section 91.13(a) violations are reinstated as to both respondents.[11]

Respondent Cannon contends in his brief that it was the responsibility of the pilot in command to obtain an amended clearance and that, as co-pilot at the controls of an aircraft which was unable to make a required altitude restriction, he had "no alternatives available to him" other than to continue to fly the aircraft and continue to climb. (Cannon Reply Br. at 7.) However, he proceeds to assert that "*[c]ockpit coordination is*

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impending deviation would preclude a finding of any actual or potential endangerment and vitiate a section 91.13(a) violation.

[10] See Administrator v. Haines, 1 NTSB 769, 771 (1970) (basic purpose of ATC clearances, and strict adherence thereto, is to maintain safe separation between aircraft - by deviating from his clearance respondent in effect subjected his aircraft and its occupants to the potential hazard of a collision); Administrator v. Boyd, 1 NTSB 1813, 1814 (1972) (presence of ATC radar coverage does not remove completely all potentiality of danger since separation of aircraft on IFR flight plans is predicated on their strict adherence to assigned altitudes).

[11] It should be noted that the law judge's finding that respondent Winter violated section 91.123(a) was enough, standing alone, to support a finding of a residual 91.13(a) violation. See Administrator v. Johnson, NTSB Order No. EA-3769 at 6 (1993), and cases cited therein.

The fact that respondent Cannon, as second in command, was not also charged with the additional operational violation of section 91.123(a) (which applies only to a pilot in command), does not preclude a finding that he nonetheless violated section 91.13(a). As we said in Administrator v. Haines, at 771, "the act of deviating from an air traffic control clearance [need not] be specifically proscribed by regulation in order to provide the duty or standard against which respondent's conduct could be measured. The requirement to comply with such clearances is an inherent part of a pilot's overall responsibilities."

paramount and the authority of the pilot in command is supreme." (Id., italics ours.) Thus, while apparently intending to rely on the latter half of this statement, respondent Cannon acknowledges the important role of cockpit coordination, also known as "cockpit resource management," in dealing with situations such as this. Yet, he offers no indication in his statement (Exhibit R-1) that he made any effort to accomplish such coordination by, for example, advising the pilot in command that the aircraft was not going to be able to meet the restriction and requesting that he seek an amended clearance from ATC.[12] Under these circumstances, we cannot agree with respondent Cannon's apparent position that the pilot in command exercised his decision-making authority in such a manner as to render it "supreme" or exclusive.

Turning now to respondent Winter's appeal, we conclude that he has failed to show any error in the law judge's allegedly "hurried" scheduling of this hearing. We note first that the law judge's Notice of Hearing was served December 13, 1991, 47 days before the scheduled hearing date, an amount of time which should have been more than adequate for respondent Winter to prepare his case.[13] Although we recognize that hearings are commonly

[12] We note that, as the pilot at the controls, respondent Cannon was likely in the best position to evaluate whether the aircraft would be capable of meeting the altitude restriction.

[13] In this regard, we note the Ninth Circuit Court of Appeals' recent observation, in the context of a challenge to the expedited nature of our emergency proceedings, that the respondent in that case had "thirty days to prepare for the hearing before the ALJ -- a length of time we would ordinarily

scheduled further in advance than occurred in this case, our rules require only 30 days notice. 49 C.F.R. 821.37(a). The law judge's denial of respondent Cannon's request for a continuance (in which respondent Winter joined) has not been shown to be prejudicial or an abuse of discretion.

Respondent Winter suggests in his appeal brief that he was prejudiced because he lacked sufficient time to conduct meaningful discovery, and because some discovery issues were still unresolved at the time of the hearing. However, a review of the record indicates that substantial discovery was accomplished, and that the "unresolved" issues consisted solely of his disagreement with the Administrator's legitimate objections to certain of his requests for admission.[14] Those disagreements were easily disposed of by the law judge at the hearing (Tr. 7-20), and respondent Winter does not argue that they were incorrectly disposed of. In sum, we can find no prejudice to respondent Winter as a result of the scheduling of the hearing date in this case.

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consider adequate to prepare a defense." Tur v. FAA, No. 92-70094, slip op. at 11 (9th Cir. 1993).

[14] It became apparent at the hearing that the four requests for admissions that the Administrator objected to as vague and/or ambiguous were intended to elicit admissions of asserted facts which either had already been admitted in other contexts, or which implicated key issues to be tried at the hearing. (See Attachments 12 and 13 to respondent Winter's brief, and Tr. 7-20.)

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's appeal is granted;

2. Respondent Winter's appeal is denied;

3. The initial decision is affirmed in part and reversed in part, as described in this opinion and order; and

4. The orders suspending respondents' ATP certificates, with waivers of sanction, are affirmed in their entireties.

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HAMMERSCHMIDT, and HALL, Members of the Board, concurred in the above opinion and order.